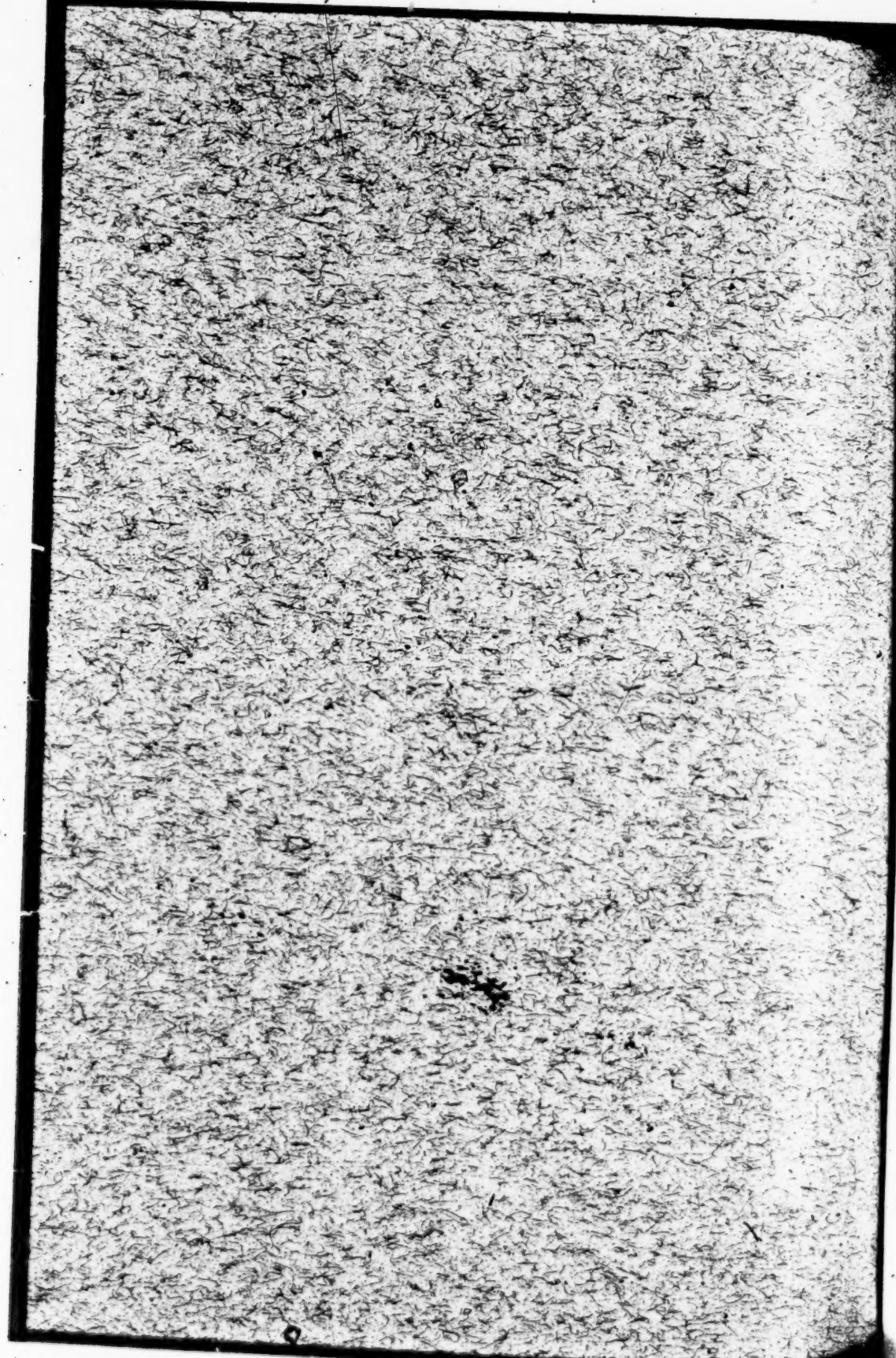

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 435.

SANTOS MIGUEL, *Petitioner*,

vs.

J. RAYMOND MCCARL, Comptroller General of the United States, and FREDERICK W. COLEMAN, Chief of Finance, United States Army.

BRIEF ON BEHALF OF PETITIONER.

SAMUEL T. ANSELL,
GEORGE M. WILMETH,
Attorneys for Petitioner.

BURR TRACY ANSELL,
Of Counsel.
835 Transportation Bldg.,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions of the Courts Below	1
Jurisdiction	2
Questions Presented	2
Statutes, Executive Circular and War Department Special Order Involved	2
Statement of the Case	2
Specification of Errors	7
Argument	8
Point I. Powers of the President and the Secretary of War in the administration of military affairs	8
Point II. Position of War Department with respect to decision of the Comptroller General	22
Point III. The Comptroller General exceeded his jurisdiction in going behind and refusing effect to the act of the President in retiring petitioner	25
Point IV. The determination of Petitioner's right to retirement rested exclusively with the President, not with the Comptroller General or the Congress	28
Point V. The position of the Comptroller General runs counter to the Constitutional authority conferred upon the President as Commander-in-Chief of the Army	32

Page

Point VI. The retired pay of Petitioner was legally fixed by the Secretary of War 34

Point VII. Pay and allowances of Philippine Scouts' are paid from appropriations applicable to all enlisted men of the Army 34

Point VIII. Funds for payment of Petitioner's retired pay were available 35

Point IX. Correct statutory interpretation demonstrates judgment should have been for Petitioner 38

Conclusion 43

CITATIONS.

Cases Cited:

Atkinson v. Stewart, 23 Phil. Rep. 405 12
U. S. v. Arredondo, 6 Pet. 691, 729, 730 20
Barwis v. Keppel, 2 Wils. 314 19
Bates and Guild v. Payne, 194 U. S. 106, 108, 109 ..27, 41
Belcher et al. v. Linn, 24 How. 508, 522 20
Bernards Township v. Morrison, 133 U. S. 523, 528 20
Billings v. U. S., 23 Ct. Cls. 166, 178 19
Board of Commissioners v. Aspinwall, 24 How. 376; 21 How. 539 .....25, 26
U. S. v. California & Oregon Land Co., 148 U. S. 31, 43 20
Callers v. McDonald, 258 U. S. 416 16
Carter v. McClaughry, 183 U. S. 365, 380 16
Coleman v. Tennessee, 97 U. S. 514 16
Dynes v. Hoover, 20 How. 65 .....16, 20
U. S. v. Eliason, 16 Pet. 302 11
U. S. v. Finnell, 185 U. S. 236, 244 .....27, 40
U. S. v. Fletcher, 148 U. S. 84 11

Page

U. S. v. Freeman, 3 How. 657 34
U. S. ex rel. French v. Weeks, 259 U. S. 326, 333....8, 17
Glavey v. U. S., 182 U. S. 595 27
U. S. v. Johnston, 124 U. S. 236 19
U. S. v. Jones, 18 How. 92, 95 .....18, 32
Kurtz v. Moffit, 115 U. S. 487, 500.....15, 16
McLean v. U. S., 226 U. S. 374 34
Ex parte Milligan, 4 Wall. 123 .....16, 42
Myers v. U. S., 272 U. S. 52, 133 8
Mullan v. U. S., 212 U. S. 516, 520..... 16
In re Neagle, 135 U. S. 63 .....11, 15
Ex parte Reed, 100 U. S. 13 16
Reeves v. Ainsworth, 219 U. S. 296, 305-6.....10, 17
Rolston v. Mo. Fund Commrs., 120 U. S. 390, 411... 2
Runkle v. U. S., 122 U. S. 557.....11, 15
St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 369.. 33
Smith v. Jackson, 241 Fed. 747; 246 U. S. 388..... 37
Smith v. Whitney, 116 U. S. 167 16
Springer v. Philippine Islands, 277 U. S. 189..... 31
Swain v. U. S., 155 U. S. 553..... 16
Tyler v. Pomeroy, 8 Allen 484 19
Ex parte Vallandigham, 1 Wall. 243 16
Wales v. Whitney, 114 U. S. 564 16
Whiting v. U. S., 35 Ct. Cls. 291, 301..... 27
Wilcox v. Jackson, 13 Pet. 513 11
Wolsey v. Chapman, 101 U. S. 769..... 11
Wood v. U. S., 107 U. S. 414 38
Wright v. Yuchausti & Co., 272 U. S. 640 32

Statutes:

Act of February 2, 1901, 31 Stat. 757.....3, 5, 38
Act of March 2, 1907, 34 Stat. 1217..... 4, 9
Act of February 14, 1885, 23 Stat. 365.....4, 9, 40
Act of May 10, 1926, 44 Stat. 496 5

Page

Act of July 31, 1894, 28 Stat. 208 6
Judicial Code, Section 148 6
National Defense Act, 41 Stat. 759 ..... 8, 9
Act of August 7, 1789, 1 Stat. 49 8
Act of April 30, 1798 9
Budget and Accounting Act, 42 Stat. 20, 23....24, 33, 40
Act of June 10, 1922, 42 Stat. 632 39
Act of July 22, 1866, 14 Stat. 333 40
Army Appropriation Act 1932, 47 Stat. 1277.... 42
Revised Statutes, Section 216 8
Revised Statutes, Section 1112 40

Textbooks:

Samuel, 283 9
Winthrop Mil. Law & Prec. 9, 14
Pomeroy, Constitutional Law 30
W. F. Willoughby (see also Appendix)..... 25

Opinions of Attorney General:

5 Atty. Gen. 286 32
28 Atty. Gen. 181 21
34 Atty. Gen. 250 21
37 Atty. Gen. 95 32

Decisions of Comptroller General:

2 Com. Gen. 784 30
3 Com. Gen. 132 12
4 Com. Gen. 82 12
5 Com. Gen. 301 24
6 Com. Gen. 604 24
11 Com. Gen. 191 24
Decision of January 19, 1932 6
Decision of January 31, 1925 12

Appendix 44

Supreme Court of the United States

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BRIEF ON BEHALF OF PETITIONER.

REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW.

The memorandum opinions of the Supreme Court of the District of Columbia overruling Respondents' motions to dismiss and sustaining Petitioner's motion to strike Respondents' answers, filed June 10th and July 16th, 1932, respectively are not reported but appear in the record, pages 10, 33. The final decree entered therein appears in the record at page 33.

The opinion of the Court of Appeals was filed June 26, 1933, and is reported in 66 Fed. (2d) 564. See also record, pages 42-48.

JURISDICTION OF THIS COURT.

The judgment of the Court of Appeals was rendered on June 26, 1933 (R. 42-48; 66 Fed. (2d) 564). The petition to this Court for Writ of Certiorari was filed September 6, 1933. Certiorari was granted October 23, 1933. The Writ was issued by this Court under Section 240 (a) (c) of the Judicial Code of the United States as amended by the Act of February 13, 1925, 43 Stat. 938.

THE QUESTIONS PRESENTED.

These are fully set out in the Petition for Writ of Certiorari to the Court of Appeals, filed herein September 6, 1933, on page 2.

STATUTES, EXECUTIVE CIRCULAR AND WAR DEPARTMENT SPECIAL ORDER INVOLVED.

These likewise are set forth *in extenso* on page 3 *et seq.* of the Petition for Writ of Certiorari filed herein.

STATEMENT OF CASE.

This is a personal action against J. Raymond McCarl, Comptroller General, and Frederick W. Coleman, Chief of Finance, U. S. Army, by bill in equity, brought by an enlisted man of that part of the United States Army known as the Philippine Scouts, who has been placed upon the retired list by the President acting through the Secretary of War, seeking a mandatory injunction to compel payment of retired pay withheld because of an advance decision of the Comptroller General, holding that petitioner was not lawfully entitled to retirement. It is not an action against the United States. *Rolston v. Mo. Fund Commrs.*, 120 U. S. 390, 411. The Supreme Court of the District of Columbia granted the relief prayed; the defendants appealed, and the Court of Appeals, D. C., reversed the judgment. Thereafter, upon the petition of the plaintiff, in

effect joined in by the Solicitor General though opposed by the Comptroller General, this court granted the prayer of the petition and ordered the writ of certiorari to issue.

On the third day of April, 1931, petitioner, a Philippine native, made his application in writing to the President of the United States, asking that he be placed upon the retired list provided by law for enlisted men of the army after completion of thirty years' service.

The record of petitioner's service in the Army as furnished by the Adjutant General of the Army from the official records of the War Department to the Chief of Finance, and by him to the Comptroller General (transcript of record, printed pages 13-14), shows said service to have been in the Philippine Scouts, and continuous since October 1, 1901. He therefore completed thirty years' service as an enlisted man September 30, 1931. Accordingly, his retirement as an enlisted man of the Army was, on September 3, 1931, announced in War Department Special Orders, to be effective October 31, 1931, the effective date being fixed ahead to permit transmittal of the order to the Philippine Islands.

Enlistment of Philippine natives in the United States Army was authorized by Congress upon the recommendation of President McKinley, as contained in his message of December 3, 1900, by Section 36 of the Act of February 2, 1901, 31 Stat. 757, as follows:

> SEC. 36. That when in his opinion the conditions in the Philippine Islands justify such action *the President is authorized to enlist natives of those islands for service in the Army*, to be organized as scouts, with such officers as he shall deem necessary for their proper control, or as troops or companies, as authorized by this Act, for the Regular Army. The President is further authorized, in his discretion, to form companies, organized as are companies of the Regular Army, in squadrons or battalions, with officers and noncommissioned officers corresponding to similar organizations in the cavalry and infantry arms. The total number

> of enlisted men in said native organizations shall not exceed twelve thousand, and the total enlisted force of the line of the Army, together with such native force, shall not exceed at any one time one hundred thousand. (Italics supplied)

Petitioner first enlisted under the provisions of the foregoing statute, October 1, 1901, and was assigned to the 17th Company of Philippine Scouts. Thereafter, he entered into ten other and subsequent enlistments, rising, during his continuous service of more than thirty years, from private to master sergeant, the highest enlisted grade, in which he was retired October 31, 1931. In each of his eleven enlistments, he made the same sworn declaration required of every other soldier upon his enlistment in the Army, took the same oath, and was recruited and examined, like every other soldier, by authorized recruiting officers of the United States Army.

Petitioner was placed on the retired list by virtue of the provisions of the Act of March 2, 1907, 34 Stat. 1217, in substance and effect a mere reenactment of the Act of February 14, 1885, 23 Stat. 305, the retirement law in effect at the time of the organization of the Philippine Scouts under the Act of February 2, 1901. The pertinent part of the Act of March 2, 1907, *supra*, under which Miguel was retired, is as follows:

> That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, *upon making application to the President*, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, * * *.

The remainder of the section, which deals with the money values of the several allowances to which enlisted men in general are entitled upon retirement, is omitted for the reason that both the active and retired pay and allowances of enlisted men of the Philippine Scouts are governed by a

special statute, to wit, section 36 of the Act of February 2, 1901, 31 Stat. 757, as amended by the Act of May 10, 1926, 44 Stat. 496. Section 36, as originally enacted, provided *inter alia* that:

> * * * The pay, rations, and clothing allowances to be authorized for the enlisted men shall be fixed by the Secretary of War, and shall not exceed those authorized for the Regular Army.

Travel pay not having been specifically mentioned, the Comptroller General, in a decision of August 21, 1922 (A. D. 6890), held travel pay not payable to these enlisted men. Thereupon, at the request of the War Department, the Congress amended Section 36 by providing, in the Act of May 10, 1926, 44 Stat. 496, that:

> The *pay and allowances of whatever nature and kind* to be authorized *for the enlisted men* of the Philippine Scouts *shall be fixed by the Secretary of War* and shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army: * * *. (Italics supplied.)

At the time of this enactment, retired pay and allowances constituted, and for many years had constituted, one of the kinds or classes of pay authorized for enlisted men of the regular army.

Enlistment of Philippine natives under the Act of February 2, 1901, did not begin until October 1, 1901. Therefore, no enlisted man of the organization could complete thirty years' service until September 30, 1931, and there was no occasion for the Secretary of War to exercise the power delegated to him by the Act of May 10, 1926, and to fix rates of retired pay and allowances for these enlisted men until the first eligible had nearly completed thirty years' service. The power was exercised, however, on September 21, 1931, when, pursuant to the provisions of the act, the Secretary of War, by War Department Circular No. 41, fixed the pay and allowances for the retired enlisted

men of the Philippine Scouts. The rates thus provided are, as to pay, 50 per cent, and as to allowances, about 75 per cent of the amounts authorized by law for other enlisted men of the army, as set out by amount in the Act of March 2, 1907.

Thereafter, a pay-roll voucher covering petitioner's retired pay and allowances for the month of November, 1931, correct and in exact accord with the rates as fixed by the Secretary of War in said Circular, was presented to the army disbursing officer at Manila, P. I., Major Stephen R. Beard. Major Beard, instead of honoring the voucher, on November 5, 1931 addressed a letter to the Comptroller General through the Chief of Finance, in which he stated that he, Major Beard, had reasonable doubt as to the authority of the Secretary of War to retire Miguel or to fix the rates of his retired pay and allowances. (See letter, transcript, p. 16.) In so doing, Major Beard undoubtedly believed such action proper under the provisions of section 8 of the Dockery Act of July 31, 1894, 28 Stat. 208. The Chief of Finance, without reference to the Secretary of War, forwarded the letter to the Comptroller General.

The Comptroller General on January 19, 1932, rendered to Major Beard his advance decision No. A-40048, in which, reviewing the acts of the President of the United States and the Secretary of War, in retiring Miguel and fixing the rates of his retired pay and allowances, he held enlisted men of the Philippine Scouts not eligible to retirement "by the remotest implication of the laws," and that Major Beard was therefore not authorized to pay the voucher, which would be retained by him. (R. 24-30.)

Thereafter, The Judge Advocate General of the Army, by direction of the Secretary of War, examined the advance decision of the Comptroller General, and the decision appearing to the War Department to be erroneous the Secretary of War on February 15, 1932, under Section 148 of the Judicial Code, referred the matter involved to the Court of Claims, requesting the decision of that court for his guid-

ance and action. No proceedings aside from the filing of the Secretary of War's letters and exhibits have been had in that reference, and petitioner never became party thereto. On the contrary, instead of consenting to the reference and filing petition in the Court of Claims, on April 27, 1932 he began this action.

On June 17, 1932, the date of the answer of the defendant Chief of Finance, there remained available and to the credit of the appropriation "Pay of the Army" for the fiscal year 1932, in the item "*for the pay of retired enlisted men*", approximately $402,000.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Court of Appeals erred in holding inferentially that the Comptroller General had jurisdiction to review the order of the President, acting through the Secretary of War, placing the petitioner on the enlisted men's retired list of the Army with pay.

2. The Court of Appeals erred in holding and determining that the Comptroller General was required by law when applied to by a disbursing officer to decide the question of petitioner's right to retired pay notwithstanding the action of the President placing him on the retired list with pay.

3. The Court of Appeals erred in holding and determining that the decision of the Comptroller General was based on statutes of uncertain meaning, and therefore involved "the character of judgment or discretion" by reason of which mandamus or injunction should not issue.

4. The Court of Appeals erred in holding and determining that the status of petitioner as a retired enlisted man of the Army was doubtful under the applicable statutes, and that his right to mandamus was not "clear and indisputable".

5. The Court of Appeals erred in holding and determining by implication that no appropriation was available from which retired pay could be paid to petitioner, and that this

was a question solely for the determination of the Comptroller General.

6. The Court of Appeals erred in reversing the decree of the Supreme Court of the District of Columbia and remanding the cause with instructions to dismiss the bill.

I.

Because the Army and Navy are agents of the Executive, and in recognition of his authority both as Chief Executive and constitutional Commander-in-Chief, the Congress, when enacting into law "rules for the government and regulation of the land and naval forces", has invariably entrusted their accomplishment and execution to the President. In the light of the Constitution, the Congress could hardly have done otherwise; and our entire military history demonstrates that the Congress never has done otherwise; indeed, as this Court, in effect, remarked in *United States ex rel French v. Weeks*, 259 U. S. 326, 333, a case concerned with the retirement and discharge of officers of the Army under section 24b of the National Defense Act, 41 Stat. 759, statutory recognition of the President's jurisdiction seems superfluous, since *ex virtute officii*, he would probably possess jurisdiction over military matters without it. Execution of the military and naval laws is peculiarly the President's function, the head of each military department being his *alter ego* in its operation (*Myers v. United States*, 272 U. S. 52, 133.)

Exclusive jurisdiction over military affairs was vested by act of the First Congress (Act of Aug. 7, 1789, 1 Stat. 49, reenacted as sec. 216, Revised Statutes, now USC 5: 190) in that branch of the Executive named the War Department, which created the Secretary of War the head thereof to perform and execute such duties as might "be enjoined on or entrusted to him by *the President of the United States, agreeably to the Constitution* * * * relative to * * * the military forces, * * * or other

matters respecting military affairs", and to "conduct the business of the Department in such manner *as the President shall direct.*" (Italics supplied.) The Navy, originally included in this Act, was made into a separate department under similar provisions, nine years later (Act of April 30, 1798). The entire structure of the *Law Military* is thus built upon and around the President, and the decisions of this Court from the beginning have emphasized that fact. See Samuel 283, quoted Winthrop, Mil. Law & Prec., 882.

The written Law Military comprises those statutes which deal with the composition, organization, discipline, and efficiency of the Army. Chief among these is the National Defense Act (41 Stat. 787). This act comprises, in great part, the basic code of military law, including general and specific provisions relating to the composition and organization of the Army; and the Articles of War, which deal with its government and discipline. The National Defense Act was constructed by the Congress upon the foundations of an already existing military system, of which the laws relating to the retirement of enlisted men form an important part in their relation to the morale and efficiency of the rank and file of the Army.

The Act of February 14, 1885, 23 Stat. 365, was the first law providing for retirement of enlisted men. The Act of March 2, 1907, 34 Stat. 1217, upon which the petitioner's retirement is based, is a reenactment, with amendments which do not affect this case, of the original law. Both acts are identical in their provision that when an enlisted man shall have served thirty years in the Army, he shall, upon making application *to the President*, be placed upon the retired list with pay and allowances. The reasons which impelled the Congress to the original enactment of 1885 are set forth in the report to the Congress of the Military Committee of the House. That report, printed at page 1368 of the Congressional Record, 48th Congress, 2nd Session, states, *inter alia*:

"Something is needed to give greater stability and a better standing to the enlisted man in our military service. If he could feel that he would have a proper provision for his old age he would be more likely to support the monotonous life of the service contentedly.

"Were such a provision made it would go far to make our military service an attractive one for respectable men, and in this way to get rid of the disreputable characters, who take the first opportunity to desert.

"It is scarcely necessary to say that desertion is not only a great loss to the Government in men, money, and material, but it is the source of serious demoralization.

"The annual desertions from our Army are between three and four thousand, and any measure that would lessen this number might well be considered an economical one; but beyond the question of economy stands that of justice. For it is no more than just that the soldier who has given all the best years of his life to the military service of the country should have some provision made for his old age beside the present Soldiers' Home, where he is separated from his family.

"It is the opinion of the Lieutenant General of the Army that thirty years would be the proper period of service to authorize the retirement of a private soldier or a non-commissioned officer."

The purpose of the Act was thus *to promote the efficiency of the Army* by raising the quality of its active enlisted personnel and improving its morale, these ends to be accomplished by rewarding long and faithful service. The motive was identical with that of the Act of October 1, 1890, of which this Court said, in *Reaves v. Ainsworth*, 219 U. S. 296, 305-6:

"Its purpose is to secure efficiency in those who are to be active in service * * *. * * * this was the motive of the act * * * and *naturally its accomplishment was entrusted to the President.*"

The powers of the Secretary of War are of two kinds—those with which he is invested by statute in his own capacity, and those which he exercises by authority of the President. The first class forms the lesser part of his powers; the second, representing the constitutional powers of the President in the administration of military affairs, are both more comprehensive and more important. The Secretary's order retiring the petitioner was of the latter class; that fixing the rates of his retired pay, of the former. It is with the effect of these orders that this brief is, in the main, concerned.

This Court has uniformly held the Secretary of War to be "the regular constitutional organ of the President for the administration of the military establishment of the nation" (*United States v. Eliason*, 16 Pet. 302), through whom the President speaks and acts in matters appertaining thereto (*Wilcox v. Jackson*, 13 Pet. 513; *United States v. Fletcher*, 148 U. S. 84), and that the Secretary's acts done within his legal competency are the acts of the President (*Wolsey v. Chapman*, 101 U. S. 769; *Runkle v. United States*, 122 U. S. 557; *In re Neagle*, 135 U. S. 63). It is not open to question, therefore, that the order by the Secretary of War retiring the petitioner with pay was, in the eyes of the law, *the act of the President.*

Briefly this is the legal situation: Section 1 of the Army Reorganization Act of February 2, 1901, 31 Stat. 748 (of which section 36, quoted *supra*, p. 3, provided for the creation of the organization since known as the Philippine Scouts), defined "the *Army of the United States*" to consist of "fifteen regiments of cavalry, a corps of artillery, thirty regiments of infantry, * * * and *such other* officers and enlisted men as may hereinafter be provided for". The Army of the United States thus described "embraced only what is now known as the Regular Army" (3 Comp. Gen. 135): *it was the Regular Army.* Section 2 of the National Defense Act of June 3, 1916 (*supra*, p. 8)

39 Stat. 166, specifically names the Philippine Scouts as part of the Regular Army, grouping them with the enlisted men of the Quartermaster Corps, the Medical Department, the Signal Corps, and the unassigned recruits, all of whom were then and now are component parts of the Regular Army. Section 2 of the amended National Defense Act of June 4, 1920, 41 Stat. 758 (*supra*, p. 8) likewise names the Philippine Scouts as a part of the Regular Army, providing that "the number of enlisted men of the Regular Army shall not exceed two hundred and eighty thousand, including the Philippine Scouts". The enlisted men of the organization have been held subject to military law and triable by courts-martial *as soldiers of the regular army* ever since 1901. The Courts have held them part of the Regular Army. *Atkinson v. Stewart*, 23 Phil. Rep. 405. The Bureau of Pensions has recognized their pensionable status as enlisted men of the Regular Army since 1903, and the Comptroller General himself has held them so, repeatedly. 3 Comp. Gen. 132, 135, 4 Comp. Gen. 82, 83, and A-6560, January 31, 1925. Never until his "advance" decision in this case, in which he virtually repudiates his former decisions, had the slightest doubt been cast upon the status of these enlisted men as part of the Regular Army. The War Department, following the ruling of Secretary Root in 1903 (see footnote p. 38), has uniformly regarded them as part of the Regular Army.

The Congress, pursuant to its power to raise and support armies, by section 36 of the Reorganization Act of February 2, 1901, 31 Stat. 757 (quoted *supra*, p. 3) specifically empowered *the President* "to enlist natives of those (the Philippine) islands for service in the Army." *"The Army"* here means the *Army of the United States;* in this context it could mean nothing else. As already shown, the *Army of the United States* was the *Regular Army.* Acting under the authority of that statute, the President did enlist such natives for service in the Army. This he did in the only way he could have done it, by enlist-

ing them in the Regular Army (see Footnote), being without authority under the statute to enlist such natives in anything else. When enlisted, therefore, it inevitably follows that petitioner became an enlisted man *of* the Regular Army, and that his service under such enlistments was service *in* the Regular Army. It is not possible to come to any conclusion than this, having regard for either the applicable statutes or the enlistment contracts executed by the petitioner.

Having served thirty years in the Regular Army, this enlisted man made application *to the President,* as permitted by the statute, for retirement with pay, and thereupon the President acting through the Secretary of War, placed him upon the retired list with pay, as provided by the statute, by War Department order. His active service

FOOT-NOTE.

In the trial court, photostatic copies of the petitioner's enlistment contracts were submitted to the Court by counsel representing the Secretary of War, duplicates thereof being at the same time presented to counsel representing the Comptroller General. In the brief filed for the Secretary of War in the Court of Appeals the first of these enlistment contracts, dated October 1, 1901, was set out *in extenso.* Eleven in number, they show continuous service for more than thirty years from and after that date. All are identical in form and substance, and recite that "I * * * do hereby acknowledge to have voluntarily enlisted * * * as a SOLDIER in the Army of the United States of America", for the periods named therein. Each contains the usual agreement as to acceptance of bounty, pay, rations and clothing as established by law, and each concludes with the oath:

> "And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the UNITED STATES OF AMERICA, and that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War."

These enlistment contracts are superscribed "Regular Army of the United States", and are in the same and identical form as to terms and contents as every other enlistment made in the Regular Army during the period 1901-1931.

This statement is made necessary in view of the first paragraph of the "*Statement*" found at page 5 of the Comptroller General's brief in opposition to the writ, which erroneously avers that the enlistments of the petitioner were in the Philippine Scouts and not in the United States Army, a distinction which, it is said, is material.

There is and can be no such distinction. *No person has ever enlisted in the Philippine Scouts as such.* Every enlisted man who has served or is now serving in that organization was enlisted in the Regular Army of the United States and thereafter assigned to the Philippine Scouts.

in the Army thus began as the result of an exercise by the President acting through the Secretary of War, of his power as Commander-in-Chief to enlist natives of the Philippine Islands in the Army in execution of the statute by which the Congress authorized such enlistments; and was brought to a close by another exercise by the President of his power as Commander-in-Chief to retire with pay, enlisted men who apply to him therefor after thirty years service in the Army, in execution of the statute by which the Congress authorized such retirements. From beginning to end, his active service has been performed under the orders and jurisdiction of the President; a jurisdiction vested in him by virtue of his constitutional power as Commander-in-Chief to control the personnel of the Army and his constitutional obligation as Chief Executive to see to it that the laws relating to the Army be executed according to their terms.

The military system operates in its entirety under the supervision of the President as Chief Executive and Commander-in-Chief, represented in its administration by his *alter ego* the Secretary of War. It functions through military (executive) officers and tribunals, who exercise the powers of the President by delegation (Winthrop, Military Laws & Precedents, 882, Reprint 572).

Enlistments are accomplished by recruiting officers; organizations are trained and commanded by officers of the line; promotions, demotions and discharges of enlisted men, by still others higher in the hierarchy of command. The commissions of officers are signed by the Secretary of War; inefficient officers and enlisted men are eliminated from the Service by boards of officers, convened under the authority of statute law and Presidential regulation, sometimes, with, sometimes without the intervention of the President or the Secretary of War. Military conduct is inquired into by executive bodies known as courts of inquiry; military offenses are tried and punished by other executive bodies known as courts-martial. Officers phy-

sically unfit for duty are retired by the Secretary after inquiry by executive bodies known as retiring boards; officers and enlisted men entitled to retirement for length of service are retired upon their own application to the President, by orders of the Secretary of War. All these things are done under the supervision and by the authority of the President in the exercise of the constitutional power of the Chief Executive to administer and execute the laws governing the affairs of the Army as its Commander-in-Chief, through the agency of his *alter ego*, the Secretary of War.

The finality and conclusiveness as against the world of acts and determinations of the heads of the War and Navy departments; of military and naval tribunals, boards and officers, done within the scope of their several jurisdictions, have upon every occasion been pronounced by this Court. This rule applies with equal force throughout the operations of the entire military system, since every act and determination, done within the jurisdiction of either department constitutes an exercise of the Presidential authority derived from identical constitutional sources—the President's duty, and his accompanying power, to see that the laws are faithfully executed, and his powers as Commander-in-Chief of the Army and Navy.

Thus, the finality of the sentences of military and naval courts-martial, when acting within their jurisdiction, has invariably been sustained by this Court. Courts-martial form no part of the judicial system, but are purely executive tribunals of limited and special jurisdiction (*Kurtz v. Moffit*, 115 U. S. 487, 500, *Runkle v. United States*, 122 U. S. 543, 555) convened by order of the Commander-in-Chief or subordinate military or naval officers to whom the power has been delegated, under the authority of "rules for the government and regulation of the land and naval forces" enacted by the Congress and known respectively as the Articles of War, and the Articles for the government of the Navy; and the civil courts pertaining to

the judicial system are without authority to review their proceedings farther than to make sure that courts-martial have kept within their jurisdiction. That being established, the acts of courts-martial are final, conclusive and binding against the world. "If it were otherwise", said this Court in *Dynes v. Hoover,* 20 How. 65, "the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrates or civil courts".

The rule of finality thus announced in *Dynes v. Hoover, supra,* has been repeatedly affirmed by this Court. *Ex parte Reed,* 100 U. S. 13; *Wales v. Whitney,* 114 U. S. 564; *Smith v. Whitney,* 116 U. S. 167; *Kurtz v. Moffit,* 115 U. S. 487; *Coleman v. Tennessee,* 97 U. S. 514; *Ex parte Vallandigham,* 1 Wall. 243; *Ex parte Milligan,* 4 Wall. 123; *Swaim v. United States,* 155 U. S. 553; *Carter v. McClaughry,* 183 U. S. 365, 380, 381; *Mullan v. United States,* 212 U. S. 516, 520; *Calvers v. McDonald,* 258 U. S. 416.

The decisions of this Court therefore place it beyond cavil that as to courts-martial, which form but one of the numerous parts of the constitutional military system, these executive tribunals are empowered to adjudicate finally whatever they are empowered to adjudicate at all.

This Court, however, has by no means confined to the decisions of courts-martial, its application of the rule of finality. It has applied it as well to the decisions of such other parts of the military system, founded upon the same constitutional powers, as have come before it.

The proceedings of boards charged with the duty of eliminating or discharging officers from the Army; the decisions of retiring boards; of individuals delegated to perform specific duties, or vested with general authority to decide military questions, have all been held final and conclusive when done within the limits of their jurisdiction;

and so also, the acts and decisions of the heads of the War and Navy departments.

By the Act of October 1, 1890, the President was authorized to eliminate from the active list of the Army by retirement or discharge, officers disqualified, in his judgment, to remain in active service. The operation of this act was delegated by the President to boards of officers, subject to his approval. The action of such boards within their jurisdiction was held by this Court to be final and conclusive when approved by the President, in *Reaves v. Ainsworth*, 219 U. S. 296, 304, 306, the Court saying:

> "The decision * * * of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts. *Johnson v. Sayre*, 158 U. S. 109. See also *Mullan v. United States*, 212 U. S. 516. * * * If it be disputable whether these provisions guarantee to an officer 'the safeguards of a trial in court', it is certain that the decision is not final with the board but must be reported with the proceedings to the President, and may be approved or disapproved by him. *This is the only relief from the errors or the injustice that may be done by the board which is provided.* The Courts have no power to review. The Courts are not the only instrumentalities of the government. They cannot command or regulate the Army."

By section 24b of the National Defense Act of June 4, 1920, 41 Stat. 759, the retirement, discharge and elimination of officers from the Army was authorized, by means of Classification Boards composed of officers, subject to optional supervision of the President. Construing this provision of law in *French ex rel. v. Weeks*, 259 U. S. 326, 327, 332, this Court said:

> "The Army Reorganization Act is intended to provide for a reduction of the Army of the United States to a peace basis while maintaining a standard of high efficiency. To contribute to this purpose, Congress made elaborate provisions in the Act for retaining in

the Service officers who have proved their capacity and fitness for command and for retiring or discharging those who, for any reason, were found to be unfit. Every step of this process is committed to military tribunals, made up of officers, who by experience and training should be the best qualified men in the country for such a duty, but with their action all subject, as we shall see, to the Supervisory Control of the President of the United States." (p. 327 * * *.)

"Thus we have lawfully constituted military tribunals, with jurisdiction over the person and subject matter involved unquestioned and unquestionable, and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy that under such conditions decisions by military tribunals, constituted by act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise. *Johnson v. Sayre*, 158 U. S. 109, 118; *Carter v. McClaughry*, 183 U. S. 365, 380, 381; *Mullan v. United States*, 212 U. S. 516, 520; *Collins v. McDonald*, 258 U. S. 416."

And in the case of *United States v. Jones*, 18 How. 92, 95, this Court announced the principle from which it has never departed when passing upon the effect of decisions of the President made through the head of the competent executive department upon matters committed to that department. The Court said:

"The Secretary of the Navy represents the President and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. *The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments*". (Italics supplied)

This language was specifically reaffirmed in *United States v. Johnston,* 124 U. S. 236.

The Court of Claims, in *Billings v. United States,* 23 Ct. Cls. 166, 178, followed the rule of the Jones case, saying:

> "It is not for accounting officers to inquire into the reasons, nor to take exception to * * * the orders of the President or a department head when issued within the general scope of their authority," and that balances stated by the Comptroller are "not * * * conclusive upon the head of a department in the exercise of his discretion. * * *"

Both the Jones and Billings cases arose out of the creation, by the head of the competent department, of a *military status* which by operation of law entitled the officer concerned to the payment of certain allowances from public funds. In both cases the accounting officers had disallowed the payments, presuming, as in this case, to go behind the orders of the department head, made within his jurisdiction. In both cases the act of the department head, creating *status,* was held conclusive.

The substance of the decisions of this Court upon the subject may well be summarized in the language of the Supreme Judicial Court of Massachusetts which, speaking through Mr. Justice Gray, later a member of this Court, said in the case of *Tyler v. Pomeroy,* 8 Allen 484:

> "Although cases of this kind have fortunately never been common, the general principles which must guide the inquiry are well settled and may be briefly stated. With acts affecting military rank or status only, or offenses against articles of war or military discipline, the civil courts have uniformly declined to interfere. Barwis v. Keppel, 2 Wils. 314. *In re Mansergh,* 1 Best & Smith 406, 407, 408: *Johnstone v. Sutton,* 1 T. R. 546, 548, 549; S. C. nom. *Sutton v. Johnstone,* Ib. 784; S. C. 1 Bro. P. C. (2nd ed.) 100. *United States v. Mackenzie,* 1 N. Y. Leg. Obs. 371. 1 Kent. Com. (6th ed.) 341, note. No acts of military officers or tribunals, within the scope of their jurisdiction, can be revised,

set aside or punished, civilly or criminally, by a court of common law. *Leonard v. Shields*, 1 McArthur on Court Martial (30 ed.), 159, *note* 296; 2 Ib. 263, 264. *Grant v. Gould*, 2 H. Bl. 69. *Bailey v. Warden*, A. M. & S. 400. *Wolton v. Gavin*, 16 Q. B. 48. *Luther v. Borden*, 7 How. 45, 46. *Wilkes v. Dinsman*, 7 How. 89; S. C. *nom Dinsman v. Wilkes*, 12 How. 403, 404. Dynes v. Hoover, 20 How. 82.

The jurisdictional integrity and independence of the military system, thus recognized by this and other Courts is but an application to the acts and decisions of the President, done through the head of the competent executive department, of the long established rule repeatedly announced by this Court that:

> "It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person, denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the acts done by the tribunal or officer; whether executive (1 Cranch 170-1), legislative (4 Wheat. 423; 2 Pet. 412; 4 Ib. 563), judicial (11 Mass. 227; 11 S. & R. 429, adopted in 2 Pet. 167-8), or special (20 Johns. 739-40; 2 Dow P. C. 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law." *United States v. Arredondo*, 6 Pet. 691, 729, 730; *Belcher et al. v. Linn*, 24 How. 508, 522; *Bernards Township v. Morrison*, 133 U. S. 523, 528. *United States v. California & Oregon Land Co.*, 148 U. S. 31, 43.

To decide the petitioner's eligibility to retirement clearly involved the exercise of judgment and discretion. It was

a question of mixed law and fact as to which the President must construe and apply the law which authorized the petitioner's enlistment "for service in the Army" in 1901; the laws which defined the composition of the Army both then and thereafter, and the relation of the retirement laws to both. He must, in the light of these laws, determine his length of service, by applying the facts contained in the archives of the War Department, as shown by the petitioner's enlistment contracts and the records of his service, with due regard to the many incidents that, under Army regulations having the force of law, may have affected the periods properly to be credited toward retirement. For such length of service is affected by absences, by illnesses or injuries not in line of duty; by court-martial sentences, and numerous other causes. It cannot be determined by a mere inspection of the calendar.

Such a decision as this was peculiarly within the province and jurisdiction of the War Department. Not only did the statutes make it so, but the nature of the question made it so, for the War Department is both the administrator of the military laws, and the keeper and custodian of the military records. It alone possessed the requisite knowledge of the military establishment. It was a decision necessitating an exercise of the jurisdiction of the competent department, since it is obvious that if the Secretary of War, the *alter ego* of the President, was not empowered to make it, then nobody had that power, and the object of the statute had failed. (See 34 Atty. Gen. (Stone) 250. *A parallel case*); and since there was no provision of law for its review by any other officer or tribunal, when made it was *res judicata* (28 Atty. Gen. (Wickersham) 181).

Retirement in the Army, it must not be forgotten, is not a separation from the service, but a mere change in a continuing military status. When officers and enlisted men of the Army are placed upon the retired list, their military lives are not terminated thereby. Quite the contrary is the fact, for by specific provision of the laws (Section 2, Na-

tional Defense Act of June 4, 1920, 41 Stat. 758 (p. 759) "the officers and *enlisted men* of the retired list" are named as components of the Regular Army. As such, they remain subject to military law, to trial by court-martial, and to recall by the Commander-in-Chief to active duty with the colors. During the World War hundreds of retired officers were so recalled, and *nearly every retired enlisted man who remained physically fit* was ordered to active duty. Some seven hundred-approximating 20 per cent of the then total number of retired enlisted men, performed important and responsible war duty: training recruits at the cantonments, superintending work at the supply depots, releasing younger men for service with the Army in France. The retired enlisted man remains in every sense a soldier of the United States.

II.

The poistion taken by the War Department in this matter has been at all times consistent. The Secretary of War having moved to correct the situation resulting from the Comptroller General's advance decision by departmental reference to the Court of Claims—the only method provided by the laws to a department head—requested that court, upon institution of this action by the plaintiff, to hold his reference *in statu quo* and with the approval of the Attorney General, sent his representatives to appear as *amici curiae* before the Supreme Court of the District of Columbia sitting as a court of equity, to present the War Department's view that the Constitution and the statutes having committed to the jurisdiction of the President, and without provision for review, the matter of retirement with pay of enlisted men of the Army, the Comptroller General, in going behind and refusing effect to the order of the President retiring with pay an enlisted man of that part of the Army known as the Philippine Scouts, had exceeded his lawful jurisdiction, and invaded that of the President.

In urging this view in the courts below, neither the Secretary of War nor this petitioner has questioned that in this and other recent cases involving the same principle, the Comptroller General acted in accord with his understanding of the scope of his jurisdiction and duty. Petitioner, however, as did the Secretary of War in the courts below, *does* question the correctness of the Comptroller General's views as to his jurisdiction, and challenges his position that the laws impose upon him the duty or vest him with the power to re-examine and re-determine questions of law and fact already examined and determined by the President in a matter committed by the Constitution and the statutes to the latter's jurisdiction, to wit, the retirement with pay of enlisted men of the Army.

The issue is not new. It has existed in governmental administration, in greater or less degree, for many years. So long ago as 1901, a great lawyer, Elihu Root, then Secretary of War, because accounting officers of the Treasury *occasionally* declined to accept as final, decisions of the Secretary of War in matters committed to his jurisdiction, formally ordered that the War Department "will not hereafter furnish copies of records or statements from them to enable officers * * * of other Executive Departments to review decisions made by the War Department upon purely military questions or to make independent decisions with regard to such questions" which it was "the duty of the War Department to determine in the course of or as incident to the execution of the law". *W. D. Circular, November 2, 1901.*

Judge Advocate General Lieber, whose authoritative writings on military law have many times been cited by this Court, presenting the matter to Secretary Root remarked that: "The question especially presented is as to the power of * * * accounting officers * * * to transfer the jurisdiction of deciding military questions from the competent department to themselves. They have assumed this power, and it is not easy to see why, if they may do it in

any cases, they may not do it in all". For the Court's convenience pertinent extracts from General Lieber's memorandum to Secretary Root are printed in the Appendix at pp. 44-49. The memorandum is out of print and difficult of access.

The identical question is presented by this case. Since 1901, however, and especially since enactment of the Budget and Accounting Act of June 10, 1921, 42 Stat. 20, 23, the attitude of the accounting officers, as foreseen by General Lieber, has developed from *occasional* refusal to accord effect to the rulings of the War Department in military matters, to the *habitual* overriding of decisions made within his legal competency by the Secretary of War. The head of the General Accounting Office, the Comptroller General, asserting that under the provisions of section 304 of the Budget and Accounting Act he is constituted a legislative agent, subordinate only to Congress (74 Cong. Rec. 6083, 6084; Ann. Rep. Comp. Gen. 1926, p. 2; Ibid, 1927, pp. V, VI); that he may independently decide any question, regardless of its prior decision by another officer vested with jurisdiction to decide it (6 Comp. Gen. 604; 11 Ibid. 191; 5 Ibid. 301, 688; 4 Ibid. 773; 3 Ibid. 497, 545; 2 Ibid. 784; 1 Ibid. 536; 3 Ibid. 771); that he is not bound by the opinions of the Attorney General (4 Comp. Gen. 773; 5 Ibid. 688; 3 Ibid. 497; 2 Ibid. 784), nor even by the decisions of the Courts (3 Comp. Gen. 316; Ibid. 479; Ibid. 545), exercises such asserted jurisdiction by going behind and re-determining in whatever manner seems to him correct, the very questions already decided by department heads on subjects especially committed to them by statute, with the result that the operation of the executive departments has been reduced to uncertainty and doubt, and their administration made dependent, not upon the direction of their lawful heads, but in large measure upon the approval of the Comptroller General. It is thus an existing condition, not a theory; a condition which carries threat to the national defense in time of peace, and portends disaster in time of war.

The many differences which have arisen between the Executive Departments and the Comptroller General, and the resulting confusion, has been discussed by Prof. W. F. Willoughby in "The legal status and functions of the General Accounting Office of the National Government", in which work the author recognizes the constitutional difficulties which arise from the Comptroller General's broad assertions of jurisdiction to revise executive determinations, and that while such differences have always existed between the accounting officers and the Executive Departments, "this question * * * has become more acute since the creation in 1921 of the independent General Accounting Office." Mr. Willoughby's statement of the matter is printed in Appendix, p. 49.

III.

The Court of Appeals, we submit, misapprehended quite the issue in this case as made by the pleadings. The action was not directed to review by the courts of the Comptroller General's decision, but sought injunction against him on the ground that in going behind and refusing effect to the President's act, he had exceeded his jurisdiction. The intervention of the Secretary of War by his representatives as *amici curiae* was directed to assertion of the paramount jurisdiction of the President, as Chief Executive and Commander-in-Chief. The Court of Appeals failed to give to the jurisdictional situation the consideration its importance to orderly government required, and apparently assumed the Comptroller General's jurisdiction as granted. In this the Court of Appeals was mistaken and was led thereby to judicial error.

The case of *Board of Commissioners v. Aspinwall*, 24 How. 376, is cited by the Court of Appeals as illustrative of the rule that only when a petitioner's right is clear and indisputable will mandamus or injunction issue, and hence, if inquiry into the merits is requisite to determine the right, neither writ will lie. In that case, this Court held Aspin-

wall's right clear and indisputable and affirmed the grant of the writ. The Court of Appeals, however, failed to look sufficiently far to discover the basis of the decision. That basis is found in the decision of this Court in an earlier case between the same parties, viz; *Board of Commissioners v. Aspinwall,* 21 How. 539, in which this Court, in an action by Aspinwall to collect upon certain bonds of Knox County, Indiana, held the decision of the Board of Commissioners of that county that an election authorizing issuance of said bonds was regular, to be final and conclusive and not subject to attack by way of defense against the bonds. Whether the election had been properly conducted, said this Court (p. 544) was a question which "belonged to the board". The later action by Aspinwall (cited by the Court of Appeals) was for mandamus to compel the levy of a tax to satisfy a judgment recovered in his first action. Aspinwall's rights having been determined in that action, and the county being without funds upon which his judgment could be executed, this Court naturally held, in the later action, that his right to the writ was clear and indisputable.

The principles applied by this Court in the two Aspinwall cases are equally applicable to this case. Here the petitioner's right arises from and rests upon the act of the President, who, acting through the Secretary of War, and within his constitutional and statutory jurisdiction, decided plaintiff to be eligible to retirement with pay, and placed him upon the retired list by War Department order, precisely as Aspinwall's right arose from the decision of the Board of Commissioners, within its jurisdiction, that the election was regular, and its issuance of the bonds authorized thereby. As in Aspinwall's case the regularity of the election was a question that "belonged to the Board, so in this case, the petitioner's eligibility to retirement was a question that "belonged" to the President: and the finality of both decisions was determinable by precisely the same rules of law.

In Aspinwall's second case, mandamus to enforce his right was asked against the body empowered to grant it; in this case injunction is prayed against a subordinate who refuses credit to the President's decision, to prevent interference with petitioner's right and to compel the performance of a ministerial act. Were this a case in which the President had *denied*, instead of granting petitioner's application for retirement with pay, and the action were directed against the President (conceiving such an action possible) to compel such retirement; then, if his right was not clear and indisputable, the writ would not lie.

But no such situation exists. The petitioner's right is clear and indisputable for the same reason that Aspinwall's right was clear and indisputable, both being founded upon the acts and decisions of public officers vested by law with jurisdiction to make them, as to which no review by any other was provided by the law, and neither of which acts and decisions was, or is claimed to be, arbitrary and capricious, or clearly and obviously erroneous. Mere doubts as to the correctness of such decisions, by whomsoever entertained, furnished no ground to refuse them credit. *United States v. Finnell*, 185 U. S. 236, 244; *Bates and Guild v. Payne*, 194 U. S. 106, 108, 109, quoted *post*, p. 41.

Since the President had undoubted power and exclusive jurisdiction to retire petitioner, it must follow that he had power to *retire him with pay*, for under the statute, retired pay is a necessary incident to the status of retirement. The existence of the one both implies and establishes the right to the other; the statute links them inseparably together. Therefore it is idle to contend that the Comptroller General's decison does not affect petitioner's retired status, but only his right to retired pay. When petitioner was retired, his right to retired pay attached by operation of law. *Glavey v. United States*, 182 U. S. 595; *Whiting v. United States*, 35 Ct. Cls. 291, 301. "Pay follows status".

The Court of Appeals therefore erred in holding that when applied to, the Comptroller General was required by law to render his decision as to petitioner's right to retired pay; for that was equivalent to holding that the Comptroller General was required to render his decision upon the President's power to retire him. The matter of *retirement with pay* was not within the scope of the Comptroller General's jurisdiction; it "belonged" to the President.

IV.

No theory has been advanced upon which the activities of the Comptroller General in going behind and overriding the acts of the President done within his jurisdiction, are constitutionally admissible unless it be that advanced by himself in the opening sentence of his "Argument" (p. 19, Comptroller General's brief in opposition to the writ)—that accounting is a legislative and not an executive function (See also Foreward to Annual Report of Comptroller General for 1927, p. VI); and that it includes the decision of every question of law or fact that may underlie any disbursement irrespective of prior decision by other officers charged with such duty.

> "The jurisdiction of this office in the settlement of accounts" says the Comptroller General "is to determine any question involved therein; that jurisdiction is specifically recognized in section 8 of the act of July 31, 1894, 28 Stat. 208" (the Dockery Act), "and sections 301 and 304 of the act of June 10, 1921, 42 Stat. 23" (the Budget and Accounting Act). "*The suggestion that certain or some questions are independent of the question of the payment proposed or which will result cannot be looked upon favorably,* as it would lead to determination by others of questions involved in the settlement of accounts independently of this office, to which such determinations are committed * * *. Where a question of * * * pay * * * is involved, *any other question necessary to be determined in ascertaining * * * legal right to * * * pay and the*

> *rate of pay is within the exclusive jurisdiction of this office,* with the right on the part of the claimant if dissatisfied to present the matter in such forum as may be open to him—the Congress or the courts." (Italics supplied (6 Comp. Gen. 604, 606.)

Such a definition of accounting, it may be observed, covers in practical implication the entire field of governmental administration, for the acts and decisions of the heads of executive departments that do not involve directly or indirectly a disbursement of public funds are comparatively few. And it is so applied by the Comptroller General.

That the accounting officers of the government were from 1789 to 1921, part of one of the executive departments, and like other executive officers, and unlike legislative officers, they always have been and still are appointed by the President with the advice and consent of the Senate, seems to us to show the fallacy of the theory of legislative agency. The Constitution (Art. II, sec. 3, clause 4) lays upon the President, not upon Congress, the duty to "take care that the laws be faithfully executed." The very purpose of government accounting and as well the reason for the existence of accounting officers is to make as certain as may be that the laws relating to disbursement of public moneys are faithfully executed. Accounting officers must therefore be the arm, not of Congress, but of the President; for, if the contrary were true, it would be Congress, and not the President, who would "take care that the laws be faithfully executed". It was never intended that Congress should administer the laws which it makes; nor was it ever intended that section 8 of the Dockery Act, which empowers the Comptroller General to make "advance decisions" upon questions of accounting, binding upon the General Accounting Office, should be administered in a manner so foreign to its purpose as to lay prohibitive injunctions upon the President, and thus to preclude him from the performance of this all important constitutional obligation.

"The President," says Mr. Pomeroy (Constitutional Law, sec. 632), "must be left free to 'take care that the laws be faithfully executed'; that is, free to take care that the subordinate officers, who are charged with express, positive duties, in fact perform those duties faithfully. Any attempt to clothe a subordinate official agent, whether of a high or low grade, with express, positive duties which he must fulfill to the letter, or with duties, in the fulfilment of which he has a discretion, and to remove him entirely from the control of the President, to make him entirely independent of the Chief Magistrate,—any such attempt would be directly contrary both to the letter and to the spirit of the Constitution. It would be so far vesting the Executive power in a person other than the President; and it would so far deprive the President of the express power conferred upon him to 'take care that the laws be faithfully executed'. Great as is the legislative function, the people of the United States have never authorized their Congress to construct a new Constitution."

That the foregoing does not accord with the views of the Comptroller General is clear from his utterances upon the subject. A letter addressed by him to the President under date of May 29, 1923 (reported at 2 Comp. Dec. 784), informing the Chief Executive that the General Accounting Office was in nowise bound to heed an opinion of the Attorney General, contains the following extraordinary statement (p. 785):

"* * * it seems proper to suggest the absence of any mention therein of the basic laws which control all branches of the Government in the use of public funds *and places the duty upon this office to see that the laws with respect thereto are duly observed,* * *" (Italics supplied)

This language requires but little comment. The words "duly observed" are equivalent, in this context, to "faithfully executed". Used in a pronouncement addressed to the President in person, upon whom the Constitution lays

the charge to see to it that *all* the laws be faithfully executed, they are peculiarly significant, and capable of but one construction. *The Comptroller General here informs the President of the United States that the duty to see to it that the laws respecting the use of public funds be faithfully executed, devolves not upon the Chief Magistrate, but upon himself as agent of the legislature.*

We sbmit that the position thus asserted by the Comptroller General is at variance with the fundamentals of the Constitution, for as this Court said in the recent case of *Springer v. Philippine Islands*, 277 U. S. 189 (p. 202):

> "It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.
>
> "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."

That decision of the question of petitioner's retirement with pay—a military question pure and simple—was within the exclusive jurisdiction of the President and his *alter ego*, the Secretary of War, and that their determination, within their jurisdiction, of that question, must be accepted by the Comptroller General as the point from which his audit shall begin, follows inevitably from the provisions of the Constitution, the applicable statutes and the decisions of this Court. The principles announced in

United States v. Jones, 18 How. 92, 96, and applied in *Wright v. Ynchausti & Co.*, 272 U. S. 640, cannot be reconciled with any other view.

The expressions of the Attorneys General are all to the same effect, from the opinion of Attorney General Crittenden to the Secretary of War (5 Ops. Atty. Gen. 286), to those of the present administration. Without exception they support the position taken by the petitioner and the Secretary of War in this case. The two latest opinions of that office,—Attorney General Mitchell to the Secretary of Agriculture, March 1, 1933 (37 Ops. Atty. Gen. 95, 100), and Acting Attorney General Biggs to the Secretary of War, August 8, 1933, we invite to the especial attention of the Court. Mr. Mitchell, citing the decision of this Court in *Wright v. Ynchausti & Co.*, 272 U. S. 640,—a case analogous in principle to the case at bar, said:

> "This decision confirmed the view previously taken by the Attorneys General * * * and it settled the proposition that under his general power to audit disbursements and settle accounts *the Comptroller General cannot go behind findings and determinations of the heads of the executive departments in matters specially entrusted to their judgment by statute.*" (Italics supplied)

The full experience of Mr. Mitchell, both as Solicitor General and Attorney General, gave him the intimate acquaintance with the subject that adds weight to his views. The opinion of Acting Attorney General Biggs, as yet unpublished, is printed for convenience of reference, in the Appendix (pp. 52-56).

V.

In his brief filed as *amici curiae* in the Court of Appeals, the Secretary of War said that the principles involved in this case are vital to the War Department and to constitutional government. That statement petitioner adopts and repeats.

We submit that the Budget and Accounting Act of June 10, 1921, *supra*, and particularly section 304 thereof, construed in consonance with the Constitution—for if it can be, it must be so construed (*St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 369), has not made the Comptroller General a legislative agent, independent of the President. The powers and duties of his office as to accounting being precisely those of his predecessor the Comptroller of the Treasury, *wholly executive*, the effect of requiring that the duties of the General Accounting Office be performed without direction from any officer other than the Comptroller General has been to constitute him the head of a separate establishment pertaining to and part of the executive branch of the government, with certain duties not related to accounting, as to which, like other executive officers charged with the duty of making investigations, reports and recommendations, he may be an agent of the Congress. As such head, he is bound to respect the proper powers and jurisdiction of the heads of other executive departments and establishments, even as they are bound to respect his, all under the supervision and paramount authority of the President. We think this must be so, for the Constitution declares (Art. II, Sec. 1, Clause 1) that "The executive power is vested in a President of the United States of America"; it has laid upon him (Art. II, Sec. 3, Clause 4), the obligation "to take care that the laws be faithfully executed," and has named him the Commander in Chief of the Army (Art. II, Sec. 2, Clause 1).

If, however, the Congress has indeed by statute created an officer independent of the President, whose only superior is the Congress, who is empowered to go behind and override the acts and decisions of the Chief Executive and Commander-in-Chief of the Army done through his constitutional representative the head of the War Department, in matters involving functions of command especially committed to his jurisdiction by the constitution and the laws, it has gone far toward nullifying these provisions of the Con-

stitution; it has shorn the President of power to take care that the laws relating to the military forces are faithfully executed, and has reduced to comparative impotence, the Commander-in-Chief of the Army. It has, in short, created an officer who in theory and in practice is the President's superior. We think it clear that there is no place in government under the Constitution for such an officer as this; and that whatever be his status, such powers as the Comptroller General asserts and exercises, and did assert and exercise in this case, are incompatible with the constitutional powers and obligations of the President of the United States.

VI.

The Secretary of War fixed the rates of retired pay and allowances pursuant to the authority vested in him by the act of May 10, 1826, 44 Stat. 496 (*supra*, p. 5), which in all-inclusive terms empowered him to fix "the pay and allowances of whatever nature and kind to be authorized for the enlisted men of the Philippine Scouts", with the single limitation that the same "shall not exceed or be of other classes than those now or which may hereafter be authorized by law for enlisted men of the Regular Army". Compare *McLean v. United States*, 226 U. S. 374.

Retired pay and allowances have been authorized by law for enlisted men of the regular army since 1885, and every appropriation act for the Army since 1887 has carried an appropriation "for the pay of retired enlisted men".

The rates fixed by the Secretary did not exceed, nor were they of any other class than those then and now authorized for enlisted men of the regular army; and having been fixed pursuant to law, they had the force of law, and were binding upon the Comptroller General. *United States v. Freeman*, 3 How. 657.

VII.

Since 1901, the enlisted men of the Philippine Scouts have invariably been paid from the appropriation "Pay,

of the Army", and are now paid therefrom. For the period October 1, 1901, to June 30, 1902, the item applied to their pay was "for the pay of enlisted men" from which they in common with all other enlisted men of the regular army were paid. No question as to the legality of such payment was ever raised by the accounting officers. Since June 1902, the appropriation acts have provided for their pay, and that of other enlisted men of the Army, in separate items, a method devised and frequently used by the Congress to limit the size of particular components of the Army. Their allowances, however, which correspond in nature and kind with those of other soldiers of the regular army, *have always been and are now paid from the general items of the appropriation acts applicable to all enlisted men of the Army.*

VIII.

The matter of the availability and application of an existing appropriation to the discharge of the petitioner's retired pay was a question within the jurisdiction of the Comptroller General; and until overruled by the Courts, his position upon this phase of the case is admittedly binding.

The finality of his position, however, when challenged in the Courts, depends upon and is determinable by the same rules of law that are applicable to the President's act retiring petitioner with pay. Being within the scope of his lawful jurisdiction, the Courts will not disturb it, unless it be arbitrary and capricious, unreasonable, or clearly and obviously wrong. In that event the Courts have power to intervene.

It is the petitioner's contention that the position of the Comptroller General that no existing appropriation is available or applicable to discharge his retired pay is clearly and obviously wrong; that it is arbitrary, capricious and unreasonable.

The appropriation "*for the pay of retired enlisted men*" was part and parcel of the appropriation "Pay of the

Army'' for the fiscal year 1932, as of every other appropriation for that purpose since 1887; and of that appropriation, $402,000. was unencumbered and available when plaintiff was retired.

The Comptroller General asserts that this appropriation, ''for the pay of retired enlisted men'' is not applicable to petitioner's retired pay because it is not in specific terms applied to the pay of retired enlisted men of the Philippine Scouts.

No appropriation has ever been made for retired personnel, whether officers or enlisted men, which in terms is applicable only to a specified branch or organization. Every such appropriation has been made in general terms, obviously intended to apply to *all* retired officers, and to *all* retired enlisted men. And every such appropriation has always been so applied until this case arose.

It is significant that the position of the Comptroller General as to the availability of this appropriation is an afterthought. His ''advance'' decision contains no reference to appropriations or their application: the word ''appropriation'' does not occur in it from first to last. His present position was taken during the pendency of the proceedings in the trial court, after discovering that his claim of power to review the act and decision of the President could probably not be sustained. It is in the nature of an emergency plea, shaped by the exigency in which the logic of events had placed him.

It is the petitioner's position that, being a retired enlisted man, the appropriation ''for the pay of retired enlisted men'' is clearly and obviously available and applicable to pay him, and that the Comptroller General's position to the contrary is equivalent to saying that an appropriation specifically designed and intended to pay retired enlisted men may not be applied to the very purpose for which it was designed and intended by the Congress; therefore, it is arbitrary and capricious, unreasonable and clearly and

obviously erroneous. Being so, the Courts have power to direct its proper application.

Nor is the right of petitioner to receive his retired pay a claim against the United States. The decision of Judge Clayton in *Smith v. Jackson,* 241 Fed. 747, which was adopted by the Circuit Court of Appeals, 5th Circuit, as its own, and was affirmed and commended by this Court in 246 U. S. 388, seems to us conclusive as to this. Judge Clayton said (p. 757):

> "In his answer the respondent says that he sought the advice of the Comptroller of the Treasury under the following provision of the Dockery Act" (Here the court quotes sec. 8 of the Act of July 31, 1894, set out, *ante,* p. 6).
>
> "And he insists that the Comptroller has rendered a decision against Judge Jackson that precludes any action by this Court. * * *
>
> "The relator's salary does not fall under the category of a claim against the United States. It is fixed compensation earned by him and for which a specific appropriation has been made * * *. It requires no argument to show that the case at bar is different from one where a claim is made against the United States, and judgment and discretion is vested in an accounting officer to adjust and settle the claim. *In such a case as that* the Comptroller of the Treasury shall upon application render his decision upon any question involving a payment to be made.
>
> "Here the salary was ascertained or fixed by law and the money for its payment appropriatel by Congress * * *. There was nothing left to the judgment or discretion of the respondent whose duty it was to disburse the money appropriated for the salary. Being satisfied of the identity of Judge Jackson it was the plain duty of the respondent to issue his warrant * * *. The salary of a judge who has served and for whose compensation specific appropriation has been made *is not such a claim that affords any field for the operation of the Dockery Act.*" (Italics supplied).

IX.

As to doubts expressed by the Court of Appeals upon the Comptroller General's suggestion, we submit that these arise, not from the content of the statutes to which the Court adverts (Sec. 26 of the act of June 3, 1916, 39 Stat. 181, Sec. 22a of the act of June 4, 1920, 41 Stat. 776, and the Pay Readjustment Act of June 10, 1922, 42 Stat. 632), but from the Comptroller General's lack of information as to the customs and history of the Army. The key to understanding of these acts is that the organization known as the Philippine Scouts was created in 1901 under section 36 of the act of February 2, 1901, 31 Stat. 757, as a temporary and provisional part of the regular army (see Footnote), officered in the subaltern grades by enlisted men taken from other parts of the Army and temporarily vested with the authority of officers by appointment but without nomination to and confirmation by the Senate, because of which they were not, under then existing laws, eligible to retirement *as officers*. *Wood v. United States*, 107 U. S. 414. The first of these statutes, which limited the right therein conferred to the *retirement in commissioned grade* of these temporary subalterns, to those among them who were American citizens (a considerable proportion of them were unnaturalized Europeans and Canadians), was nothing more than an expression of an established *policy*, concerned with officers alone, based on an ancient custom of the service referred to in old opinions of The Judge Advocate General as "a self-imposed re-

In 1903, Secretary of War Root, replying to an inquiry by the Commissioner of Pensions as to the status of the Philippine Scouts, ruled that the organization "is a component part of the Army of the United States, but not a part of the *permanent* Regular Army." Following this ruling, the War Department has always held the organization to be a temporary and provisional part of the regular army, similar to the Indian Scouts organized (and still existing) under the Act of July 22, 1866, 14 Stat. 333; R. S. 1112; U. S. C. 10:611. Upon this ruling by the Secretary of War, the Pension Bureau has ever since 1903 recognized Philippine Scout veterans as having a pensionable status as members of the regular army, and has paid and is now paying hundreds of such pensions to Philippine Scout veterans or their dependents.

striction on the appointing power", which held none but American citizens eligible to permanent status *as officers.* It is wholly irrelevant to the inquiry.

The proviso attached to the second of these statutes (Sec. 22a, *supra*), that its provisions should in no respect alter the status of the enlisted men, was inserted upon recommendation of the War Department to make sure that the vesting of all "Scout" officers with permanent status (a modification entirely unique of the policy above adverted to), the re-commissioning of some of them in *branches,* and the formation of the entire force into *branches*—the generic term used in military parlance from time immemorial to denote the various arms of the service enumerated in Section 2 of the act as the components of the permanent regular army, should not have the effect of making the Philippine Scout *organization,* as such, a permanent component thereof, but to retain it in the temporary and provisional status in which it was created in 1901, subject to abolition at the will of the President. The proviso has always been so construed by the War Department, and its meaning was never before questioned.

The third statute noticed by the Court, the Pay Readjustment Act of June 10, 1922, in Section 17 provides *inter alia,* promotion on the retired list for "Scout" officers, on the same pay and benefit basis as other officers of like grade and service; and in Section 21, *inter alia,* that the act shall not affect existing law or regulation "governing the pay and allowances of the General of the Armies, the enlisted men of the Philippine Scouts, Marine Band, Naval Academy Band, Indian Scouts or flying cadets; * * *". Other than this, neither officers nor enlisted men of the Philippine Scouts are so much as mentioned in the Act. It also is wholly irrelevant.

It is to be presumed, in the absence of any showing to the contrary, that all statutes in *pari materia* were fully considered, and all questions resolved by the Executive in arriving at the decision that the petitioner, upon service

for over 30 years in this temporary and provisional component of the regular army, was eligible to retirement with pay, the only form of retirement provided by the law for enlisted men. This decision followed long established departmental construction of the statute, acquiesced in by the accounting officers for more than a generation, one outstanding example of which is the uniform retirement with pay, commencing in 1905 with the Seminole *Sandy Fay*, of enlisted men of the non-citizen Indian Scouts created under the act of July 22, 1866, 14 Stat. 333, R. S. 1112, and ever since maintained as a temporary and provisional component of the Regular Army.

All questions being so resolved under authority of a statute (act of February 14, 1885, as re-enacted by the act of March 2, 1907, *supra*) which committed to the President exclusive jurisdiction over the subject matter, the remedy for doubts, if any he entertained, as to the correctness of the President's construction of the law and facts, was not that the Comptroller General review and override his decision; but if he disagreed, to report the supposed error to the Congress with his recommendation for such corrective legislation as that body might deem conducive to the public interest. This is the course of action not only contemplated, but prescribed by section 312 of the Budget and Accounting Act of June 10, 1921, *supra*.

Nor was it a proper exercise of judicial function for the Court of Appeals to sustain his over-riding of the President: its duty, if it considered the President's construction of the law and facts obviously or clearly wrong, was to so decide; but if it found the soundness of that construction merely doubtful, and that is the extreme length to which the court's opinion goes, to leave the clearing of the doubt to the discretion of the legislature. In the case of *United States v. Finnell*, 185 U. S. 236, 244, this court, defining the duty of a court to which is submitted the validity of an established department practice, said (p. 244):

"Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. *United States v. Graham*, 110 U. S. 219, *Wisconsin C. R'd. Co. v. United States*, 164 U. S. 190. But if there simply be doubt as to the soundness of that construction,—and that is the utmost that can be asserted by the Government—the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *Edwards v. Darby*, 12 Wheat. 206, 210; *United States v. Philbrick*, 120 U. S. 52, 59; *United States v. Johnston*, 124 U. S. 236, 253; *United States v. Alabama G. S. R'd. Co.*, 142 U. S. 615, 621. *Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interests*". (Italics supplied)

And in the case of *Bates and Guild v. Payne*, 194 U. S. 106, 108, 109, this court, reviewing many of its former decisions upon the subject, said (pp. 108-109):

"* * * where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. In the early case of *Decatur v. Paulding*, 14 Pet. 497, it was said that the official duties of the head of an executive department, whether imposed by act of Congress or resolution, are not mere ministerial duties; and as was said by this court in the recent case of *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324: 'Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction'.

"In *Marquez v. Frisbie*, 101 U. S. 475, which was a bill in equity to review the decision of the Land Department in a preemption case, Mr. Justice Miller re-

marked (p. 476): 'This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate as to show clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive.'

* * * * * * *

"The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

It is for Congress to make the laws which constitute "rules for the government and regulation of the land * * * forces"; it is for the President, as Chief Executive and Commander in Chief to execute them. *Ex parte Milligan*, 4 Wall. 2, 139. The Comptroller General has no function to perform in either sphere. His duty in this case went no further than to ascertain that the President, to whom was committed the responsibility of creating the *status* and making the allowances incident thereto, had performed that duty. *Waters v. United States*, 133 U. S. 208; 215; and that the person to whom the voucher therefor was drawn, was the same person or of the class of persons to whom such allowances had been made. *Smith v. Jackson*, 241 Fed. 747, 757, *et seq.* Such duty involved no exercise of judgment and discretion, but was ministerial only. *Roberts v. United States*, 176 U. S. 221, 231. Having so found, as he was bound to find, since he could not go behind the President's decision, his plain duty was to pass the voucher for payment from the appropriation in specific terms applicable to "the pay of retired enlisted men", included in the Army Appropriation Act for the fiscal year 1932, 47

Stat. 1277, 1280. To do otherwise was arbitrary and unlawful, and the courts had power to interfere by injunction. *Wright v. Ynchausti & Co.*, 272 U. S. 640, 651; 37 Ops. Atty. Gen. 95-100-101; *Smith v. Jackson*, 241 Fed. 747, 757, 775; 246 U. S. 388, 390.

CONCLUSION.

We respectfully submit that the decision of the Court of Appeals of the District of Columbia should be reversed and the cause remanded with direction to affirm the decree of the Supreme Court of the District of Columbia.

SAMUEL T. ANSELL,
GEORGE M. WILMETH,
Attorneys for Petitioner.

Of Counsel:
BURR TRACY ANSELL,
835 Transportation Bldg.,
Washington, D. C.

APPENDIX.

Excerpts from an Opinion of Judge Advocate General Lieber, November 1, 1901.

* * * Although none but the Congress, together with the President, can actually legislate for the United States, the field which the President as Executive and Commander in Chief covers with his regulations and orders, having the force of law, is enormous. Even if we limit our view to that part of it which relates to the administration of military affairs, it is still enormous. And the Secretary of War is the official through whom the President exercises this great power. And he is not only the proper official for this purpose, but the only one, except that under him there are subordinate officers who, in their lesser spheres of action and generally subject to his superior jurisdiction, have authority to determine military questions arising in the interior administration of the Army. No official of any other department is vested with the general power of acting for the President in respect to military affairs. From which it would seem to follow that when any such other official of the Government undertakes to act with reference to military affairs or to decide military questions under the jurisdiction of the Secretary of War as the representative of the President, he is acting and deciding without jurisdiction, unless as to some particular matter he shall have had jurisdiction conferred upon him by statute. Where this has not been done he is not "the competent department."

* * * the term "military questions" has been used, * * * as relating to questions of fact, or mixed questions of law and fact, appertaining to the raising of armies and beginning of service; their organization, maintenance, movement, discipline, and control; the transaction of their affairs; the termination of service; and to question of fact in the military history of individual officers and soldiers. The facts are either expressly recorded in the records of which

the Secretary of War and his subordinates are the custodians, or they are deduced from them, or sometimes from other evidence (with the constant aid of a knowledge of the custom or established practice of the military service). These deductions or conclusions are the determination of "military questions", in the sense in which the term has been used.

It will not be disputed that if the Congress, in the exercise of its power "to raise and support armies" and "to make rules for the government and regulation of the land and naval forces," should place the determination of any of these questions under the jurisdiction of officials of other departments than that which, but for such legislation, would be the only "competent department," this action would be constitutional and valid. But when this is not done, where is the authority? Does it follow that because these officials have power by law to settle claims and accounts involving the determination of military questions they are thereby themselves invested with the power of determining such questions?

* * * * * * *

Nor is the principle of the conclusiveness, within its own especial domain, of the jurisdiction of that executive branch of the Government which has control of the administration of military affairs unsustained by the courts. The decisions of the Federal courts, including the highest, are clear and positive in this respect. It is true that they in general relate to the jurisdiction of courts-martial, but it must be remembered that these military courts are no part of the judicial system. Although they have judicial powers, they are a part of the executive machinery of the Government. So that what is held in regard to the conclusiveness of their jurisdiction is by no means foreign to the subject which we are discussing.

In the case of Dynes v. Hoover (20 How., 65), the Supreme Court expressly recognized the independence, within

their own special and limited spheres, of the military and naval systems, or at least of that part of them which relates to court-martial jurisdiction. Citing the provisions of the Constitution giving Congress the power to provide and maintain a navy (this was a case arising in the Navy), and to make rules for the government and regulation of the land and naval forces, and the fifth amendment, which excepts cases arising in the land or naval forces from the requirement of a presentment of a grand jury in cases of capital or otherwise infamous crime, and the clause declaring the President to be Commander in Chief, the Supreme Court (Mr. Justice Wayne delivering the opinion) said that these provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

* * * The exposition of the law, given in Dynes v. Hoover, has been repeatedly affirmed by the Supreme Court. (Ex parte Reed, 100 U. S., 13; Wales v. Whitney, 114 U. S., 564; Smith v. Whitney, 116 U. S., 167; Kurtz v. Moffitt, 115 U. S., 487; Coleman v. Tennessee, 97 U. S., 514; Ex parte Vallandigham, 1 Wall., 243; Ex parte Milligan, 4 Wall., 123; Swain v. United States, 155 U. S., 553.)

* * * * * * *

There can thus be no doubt as to the views of the Supreme Court with reference to the independence and completeness within its sphere of action—that is, within its jurisdiction—of the court-martial system. But this principle is not limited to the court-martial system, which indeed is only a part of a general system founded on the same constitutional powers.

* * * * * * *

The jurisdictional separateness of the military system, thus recognized by the courts, is an application of the same principle that we have been considering, as applied to the conclusiveness of the jurisdiction of the competent department over military questions.

* * * * * * *

The accounting officers of the Treasury and the other officials referred to must undoubtedly construe the statutes which they have to apply in carrying out their statutory powers and duties, and their decisions, under these powers, are in general conclusive; but the fact that officers have been created for the settlement of certain claims and accounts, in the course of which the determination of *military questions* becomes necessary, does not invest them with the jurisdiction themselves to determine these questions, any more than does the power of the civil courts to afford relief in *habeas corpus* proceedings give them the right in such proceedings to review the decisions of courts-martial on *military questions*. The courts have again and again disclaimed the right of extending their jurisdiction to the determination of such questions, and have consistently recognized the conclusiveness of the action of the military authority in its determination of them. Is it not reasonable to say that this jurisdiction which they disclaim should not be assumed by these executive officers—whether or not it be held that in reaching their decisions they are exercising judicial powers?

That officials of other Departments frequently call on the War Department for its determinations in such matters, and in many cases accept and act upon them, indicates that the jurisdiction of this Department is recognized by them, to this extent certainly. But, on the other hand, they often assume the jurisdiction to decide military questions for themselves, in complete disregard of such determinations by the War Department.

* * * * * * *

It is the character of the subject to which the military question relates that makes him (the Secretary of War) the "competent Department" to handle it, * * * and if he is the "competent Department," whence do the officials of other Departments obtain a superior jurisdiction?

Sometimes even the discretionary power of the President is invaded, * * * "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." (Martin v. Mott, 12 Wheaton, 31.) But this principle is too well established to need discussion.

It is not, however, the purely discretionary powers that we are here particularly considering. The question especially presented is as to the power of * * * the accounting officers of the Treasury * * * to transfer the jurisdiction of deciding military questions from the competent Department to themselves. They have assumed this power, and it is not easy to see why, if they may do it in any cases, they may not do it in all—determining all military questions for themselves (which is, indeed, what they have at times substantially claimed the right to do). This would lead to remarkable results. * * *

* * * * * * *

* * * there has been no well-defined system in the offices of the * * * accounting officers of the Treasury in the matter of jurisdiction over military questions. Sometimes they recognize the jurisdiction of the War Department; sometimes they assert their own. A question may at one time be left to the decision of the War Department which at another time they will themselves decide, without any regard to the jurisdiction or decisions of that Department. There is no system and no consistency. Perhaps it would be nearest to a correct statement of the condition to say that the different officials who have filled these positions

have or have not accepted the conclusions of the War Department on military questions according as these did or did not agree with their own views. * * * Certainly it can be said that the fact that these questions are military questions is not recognized by them as depriving them of a jurisdiction to decide such questions.

* * * * * * *

G. N. LIEBER,
J. A. Gen'l.

Excerpt from

"The Legal Status and Functions of the General Accounting Office of the National Government."

" * * * the law in broad terms provides that 'all claims and demands of the government of the United States, or against it, and all accounts whatever in which the government of the United States is concerned either as debtor or creditor shall be settled and adjusted in the General Accounting Office'; that the powers and duties vested in the Comptroller General shall 'be exercised without direction from any other officer'; that 'the balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the government'; and that, upon the request of any disbursing officer or head of a department or independent establishment, the Comptroller General 'shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered shall govern the Auditor and the Comptroller of the Treasury [now the Comptroller General] in passing upon the account containing said disbursement.'

Though the general intent of these provisions is clear; namely, that the final settlement of all claims and the passing upon all accounts shall be vested in the Comptroller General, who, in acting shall be guided by his own best judgment, and that his action shall be conclusive upon the executive branch, the application of these provisions in practice gives rise to numerous opportunities for differences of opinion in respect to the scope of the powers of the Comptroller General.

Provisions of permanent statute law impose on the heads of departments and independent establishments the performance of certain duties and vest in them, in many cases, large discretionary power in respect to the framing of rules and regulations having for their purpose to put these laws into effect and in taking action upon specific cases arising under these laws and regulations. With rare exceptions money is required and is voted for the support of the services intrusted with the administration of the law and the performance of the work authorized or directed. The action taken by the heads of the departments and the independent establishments in the framing of these rules and regulations and in acting upon specific cases determines in many instances the circumstances under which claims for payments by the government will arise and the amounts of payments that shall be made. In not a few cases there may be a question whether the heads of the departments or the independent establishments have properly interpreted the statute, whether the rules and regulations issued by them are in conformity with the law or the action taken by them in specific cases is in conformity with the law or the rules and regulations framed for putting such law into effect.

There can be no doubt that in cases such as these it is the duty of the executive officer in the first place to construe the law and determine his powers and duties under it, and if he has doubt in respect to the matter to secure the opinion of the Attorney General. Having done this, the question is then presented as to whether this decision, whether supported or not by an opinion of the Attorney General, is binding upon the Comptroller General in settling accounts arising under the administration of the law, or whether his duty of seeing that no payment of money is made except in strict conformity with law requires that he shall determine for himself whether the action of the executive officer which had as its result to give rise to claims for the payment of money, was correct.

It is manifest that two positions can be taken in respect to this matter. The one is that the determination of the law is the duty of the officer having the administration of the law, assisted, if need be, by the advice of the Attorney General, and that the duty of the Comptroller General is restricted to seeing that no improper payments are made

in administering the law as so construed. The other is that the Comptroller General, in the performance of his duty of protecting the treasury and seeing that no payments not authorized by law are made, must himself construe the law and that if he believes that a payment is not justified by the law as so interpreted by him that it is his duty to prevent such payment being made and if made that reimbursement of the payment is enforced.

Strong arguments can be adduced in support of both of these positions.

In support of the first the claim can be made that it is the intent of Congress, and in conformity with correct principles of public administration, that responsibility for the application of law should reside with the administrative officer charged with its enforcement, that to sanction the right of the Comptroller General to review and reverse administrative action would mean that, in many matters of great importance, that officer and not the head of the department or establishment would exercise supreme administrative authority.

In support of the second, it may be urged that the whole purpose of providing for an independent audit of accounts and the determination by such independent agency of what claims shall be paid, is that of providing for a check upon administrative officers; that the actual payment of a particular claim is of secondary importance to that of determining the validity of the administrative action which gave rise to such claim; that if the Comptroller General is estopped from considering the validity of such action the door is thrown open to an abuse or unwise exercise of administrative authority that will entail illegitimate demands upon the treasury that may amount to many thousands or even millions of dollars.

In general it may be said that administrative officers adhere to the first position and that in such adherence they have had to a large extent the support of the Attorney General, and that the Comptroller General adheres to the second in which he has had up to the present time the general support of Congress. The result is that there is a sharp cleavage within the government in respect to this most important matter, and numerous cases have arisen growing out of this difference of position that have seriously interfered with the due conduct of public affairs.

In further explanation of this difference of position, it should be pointed out that the administrative services, or at least certain of them, take the position that, even if it be admitted that the Comptroller General has the right to question the interpretation placed by them upon the law for the administration of which they are responsible, if the matter in dispute is referred to and passed upon by the Attorney General of the United States it then becomes the duty, if not the legal obligation, of all officers of the government to follow the opinion of the Attorney General as so rendered. The issue in its final form thus becomes one as to whether the opinion of the Attorney General or that of the Comptroller General should govern where the construction of the law as affecting the validity of a class of claims is involved.

This question as to whether the Comptroller General should, as a matter of practice if not of law, be guided by the opinions of the Attorney General in construing the law relating to the operations of the executive departments and establishments is one that has always existed, though as will be shortly shown it has become more acute since the creation in 1921 of the independent General Accounting Office."

[W. F. Willoughby—The legal status and functions of the General Accounting Office of the National Government—1927, page 39]

OFFICE OF THE ATTORNEY GENERAL

(SEAL)

Washington, D. C.

August 8, 1933.

The Honorable

The Secretary of War.

My dear Mr. Secretary:

I have the honor to reply to your letter of May 18, 1933, transmitting the voucher of Captain Biglow B. Barbee, presented to the War Department for payment in the amount of $13.00 on account of per diem allowance for temporary duty in excess of thirty days, which you suggest be considered as an actual case pending in your Department in

connection with your request of March 16, 1933, for my opinion as to whether, in the absence of instructions issued by the Secretary of War, the Comptroller General may, by his authority alone, fix a limit of thirty days as the maximum period within which an army officer may perform temporary duty at one place and receive per diem allowance in lieu of subsistence.

It appears that a question has arisen in the Office of the Chief of Finance as to whether this voucher should be paid by reason of the Comptroller General's letter to the Secretary of the Navy dated August 26, 1932 (A-43746), wherein it was suggested that the proposed travel instructions relating to officers in the Navy be amended so as to limit the performance of temporary duty at one place for which per diem allowance might be paid to a period not exceeding thirty days. This amendment was included in the travel instructions subsequently issued by the Secretary of the Navy.

The War Department has definitely decided not to issue such regulations and the Judge Advocate General has rendered an opinion, which has your approval, holding that in the absence of instructions issued by the Secretary of War, there is no authority in law for the application of such restriction with respect to the travel of officers in the Army. Since you have decided that this is a matter entirely within the jurisdiction of the War Department you are unwilling to submit the above voucher to the Comptroller General as this would acknowledge his right to decide the question. Therefore, before issuing instructions to the Chief of Finance you request my opinion as to your authority in the premises.

Prior to June 30, 1932, officers in the Army on temporary duty were paid on a mileage basis. However, by Section 206-(a) of the Economy Act of June 30, 1932 (47 Stat. 405), such officers were placed on a per diem basis the same as civilian officers of the Government.

Section 206-(a) provides:

"During the fiscal year ending June 30, 1933—all provisions of law which authorize the payment of mileage to officers of the services mentioned in the Pay Adjustment Act of 1922 [U. S. C., title 37] are hereby suspended and in lieu thereof such officers shall be entitled to allowances for travel only as provided for civilian employees of the Government, and the Subsistence Expenses Act of 1926, as modified by this Act, and by the Act of February 14, 1931 (Supp. V, U. S. Code, Title 5, sec. 73a), shall apply to such travel * * *"

Section 207 provides:

"Section 3 of the Subsistence Expense Act of 1926, approved June 3, 1926 (44 Stat. 688, 689), is hereby amended to read as follows:

"'SEC. 3. Civilian officers and employees of the departments and establishments, while traveling on official business and away from their designated posts of duty, shall be allowed, in lieu of their actual expenses for subsistence and all fees or tips to porters and stewards, a per diem allowance to be prescribed by the head of the department or establishment concerned, not to exceed the rate of $5 within the limits of continental United States, and not to exceed an average of $6 beyond the limits of continental United States.'"

Section 208 amending Section 7 of the Subsistence Expense Act, provides:

"SEC. 7. The fixing and payment, under section 3, of per diem allowance, or portions thereof, shall be in accordance with regulations which shall be promulgated by the heads of departments and establishments and which shall be standardized as far as practicable and shall not be effective until approved by the President of the United States."

There can be no doubt as to the authority of the Secretary of War to assign officers of the Army to temporary duty as the exigencies of the service may require. This is purely a military question. Nor can there be any doubt as to his authority to issue such regulations as he deems necessary and proper respecting travel of officers in the Army. (See Sec. 161 R. S., and Section 208, amending Section 7 of the Subsistence Expense Act of 1926, *supra.*) It must follow, therefore, that unless Congress has declared an intention by law to limit the period within which officers of the Army may perform temporary duty at one place and receive per diem allowance in lieu of subsistence, the action of the Secretary of War on such matters must be accepted as final by other officers of the Government.

It does not appear from the statutes above quoted that any definite limitation has been prescribed as to temporary duty, nor that any distinction is made therein between civilian officers and officers of the Army. Therefore, since it appears from the Standardized Government Travel Regulations (Par. 48-a; A. R. 35-4060, July 2, 1927, Par. 3d and e) and the Comptroller General's decision of February 28, 1927, published therein as Appendix VII that a civilian officer may be assigned to temporary duty and receive per diem allowance for periods longer than thirty days it necessarily follows that the same rule would apply to officers in the Army.

In view of the foregoing it is my opinion, in the absence of some statutory direction to the contrary, that the matter of making regulations with respect to officers in the Army governing the performance of temporary duty at one place for which per diem allowance may be paid is vested by law exclusively within the jurisdiction of the Secretary of War and the President, and, therefore, the Comptroller General may not go behind your decision not to issue the regulation but must be guided by it in exercising his general authority to audit disbursements and settle accounts. (37 Op. A. G. 95, 100-101; 34 Op. A. G. 162, 170-171.)

As to the amount of money actually due Captain Barbee on this voucher, that must be left to the determination of the Comptroller General subject to the effect of your action in connection therewith, and for that reason I shall not express my opinion on that question.

Respectfully,

(s) J. CRAWFORD BIGGS,
Acting Attorney General.